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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/028,722	12/28/2001	Lester Benjamin Johnson	87354.1581	4118
36734 7590 03/24/2010 BAKER & HOSTETLER LLP WASHINGTON SQUARE, SUITE 1100 1050 CONNECTICUT AVE. N.W. WASHINGTON, DC 20036-5304				
EXAMINER				
RUHL, DENNIS WILLIAM				
ART UNIT		PAPER NUMBER		
3689				
NOTIFICATION DATE		DELIVERY MODE		
03/24/2010		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patents@bakerlaw.com

**Advisory Action  
Before the Filing of an Appeal Brief**

**Application No.**

10/028,722

**Applicant(s)**

JOHNSON ET AL.

**Examiner**

Dennis Ruhl

**Art Unit**

3689

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 10 March 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☒ Applicant's reply has overcome the following rejection(s): none.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: \_\_\_\_\_.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s) \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

/Dennis Ruhl/  
Primary Examiner, Art Unit 3689

Continuation of 11, does NOT place the application in condition for allowance because: the arguments are not persuasive. With respect to the previously submitted affidavit and the issue regarding the date, the comments are noted but are not accepted as persuasive. Comments written by applicant's counsel that relate to the evidence submitted in declaration form by the inventors cannot be accepted because this statement is not made in a formal declaration and because it is not being made by the inventors. The examiner cannot accept attorney comment on behalf of the inventors for issues dealing with a 131 declaration such as the date issue. Also, even if the date is proved acceptable, the examiner has indicated why the evidence itself is insufficient, so the declaration is not persuasive irrespective of the date issue. Applicant has not addressed any of those comments concerning the 131 declaration. With respect to the argument that Li does not teach that the diagnostic data is obtained from a vehicle, applicant is arguing the primary reference alone and is not addressing the combination as set forth in the two way 103 rejection. Applicant cannot attack the references individually but has to address the combination as set forth in the rejection. This argument is found on pages 10-13 of the response. The argument is not persuasive. With respect to the comments concerning Kirkevold that begin on page 14, they are not persuasive. Applicant has argued that one concerned with speed would not be motivated to obtain the diagnostic data directly from the vehicle. The examiner does not see how this relates to the claims or renders the rejection flawed. One could also be more concerned about getting more accurate data regarding the vehicle so the first diagnosis is a better diagnosis than manual data entry provides. Li can be used in a service environment, such a repair shop. Kirkevold is directed to obtaining diagnostic information directly from a vehicle in a service shop environment, just like Li disclosed. Providing a more complex and accurate diagnosis is a legitimate motivation that one of ordinary skill in the art would have to obtain the data directly from the vehicle as is disclosed by Kirkevold. Also, to the extent that the issue of slowness versus a more quick process applies to anything claimed, the examiner does not see what it is. Any rationale and reasonable explanation of why one of ordinary skill in the art would modify Li to obtain data from the vehicle, as disclosed by Kirkevold, is able to be used in an obviousness rejection. One who operates a repair shop who is more concerned with an initial accurate and better diagnosis would be motivated to obtain the data from the vehicle as set forth by the examiner and as disclosed by Kirkevold. Applicant's arguments are not persuasive. .